Supreme Court, U. S.
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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 27, 1973
WRIT OF CERTIORARI GRANTED JUNE 17, 1974

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 26, 1972 —United States Grand Jury for the District of Colorado returned indictment against Defendant for alleged violation of 21 U.S.C. § 841(a)(1).

January 2, 1973 —Defendant's Motion to Dismiss Indictment Because of Denial of a Fair and Impartial Jury, and Motion to Inspect, Copy and Reproduce the Master Jury Wheel and Qualified Jury Wheel, and Exhibit A filed in U.S. District Court for the District of Colorado.

January 23, 1973 —Hearing in District Court on Defendant's Motions, and Order entered denying opportunity to inspect master and qualified jury wheels, and denying Motion to Dismiss Indictment.

February 27, 1973 —Trial to jury commenced.

February 28, 1973 —Jury returned verdict of guilty.

April 6, 1973 —Judgment of conviction entered, and Defendant sentenced to custody of the Attorney General for eighteen months.

April 13, 1973 —Defendant's notice of appeal filed.

November 1, 1973 —Opinion and judgment of the Court of Appeals for the Tenth Circuit.

November 26, 1973—Rehearing denied in the Court of Appeals.

PLAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Filed October 4, 1968

Pursuant to the Jury Selection and Service Act of 1968, Public Law 90-274 the following Plan is hereby adopted by the Court subject to approval by a reviewing panel and to such rules and regulations as may be adopted from time to time by the Judicial Conference.

APPLICABILITY OF PLAN

The District of Colorado is hereby divided into divisions for jury selection purposes, pursuant to section 1869 (e) of the Act, as follows:

DENVER DIVISION, consisting of the counties of:

Adams	Gilpin	Phillips
Arapahoe	Grand	Sedgwick
Boulder	Jefferson	Summit
Chaffee	Lake	Teller
Clear Creek	Larimer	Washington
Denver	Logan	Weld
Douglas	Morgan	Yuma
Elbert	Park	

GRAND JUNCTION DIVISION, consisting of the counties of:

Archuleta	Hinsdale	Montrose
Delta	Jackson	Ouray
Dolores	La Plata	Pitkin
Eagle	Mesa	Rio Blanco
Garfield	Moffat	Routt
Gunnison	Montezuma	San Juan
		San Miguel

and PUEBLO DIVISION, consisting of the counties of:

Alamosa	Custer	Lincoln
Baca	El Paso	Mineral
Bent	Fremont	Otero
Cheyenne	Huerfano	Prowers
Conejos	Kiowa	Pueblo
Costilla	Kit Carson	Rio Grande
Crowley	Las Animas	Saguache

MANAGEMENT OF THE PLAN

This Plan shall be managed by the Clerk of the Court under the supervision and control of the Chief Judge or in his absence or inability to perform his duties as such, the District Judge who is present, in the District and who is next in precedence shall perform such duties.

RANDOM SELECTION FROM VOTER LISTS

Voter registration lists represent a fair cross section of the community in the District of Colorado. Accordingly, names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all the counties within the relevant division. Where necessary, on direction of the Chief Judge, from the voter list or city directories or telephone books.

The selection shall be accomplished by drawing a starting number by lot and, commencing therewith on the voter registration list of each county in the division, selecting that name with the remaining names to be selected in multiples as ordered by the Chief Judge to produce the number of names required for the Master Jury Wheel. If, for example, the starting number drawn at random was number 25 and the ordered multiple was 50, the names selected in each county would be numbers 25, 75, 125 and so on throughout the county's voter registration list.

MASTER JURY WHEELS: The Clerk shall maintain a master jury wheel for each of the divisions within the district; he shall also maintain a Grand Jury

wheel for the district. The names of all persons randomly selected from the voter registration lists of the counties in a division shall be placed in the master jury wheel for that division. The minimum number of names to be placed initially in these master jury wheels shall be as follows:

1) Denver Jury Division. Four Thousand names or at least one-half of one per cent of the total registered voters for the designated counties, whichever is the greater.

2) Pueblo Jury Division. One Thousand names or at least one-half of one per cent of the total registered voters for the designated counties, whichever is the greater.

3) Grand Junction Jury Division. One Thousand names, or at least one-half of one per cent of the total registered voters for the designated counties, whichever is greater.

The Chief Judge may order additional names to be placed in the Master Jury Wheels from time to time as necessary.

Names shall be obtained for the Grand Jury Wheel from the three Qualified Jury Wheels of the respective divisions on a pro rata basis.

The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein provided between March 1 and September 30 in every odd numbered year beginning in 1971.

The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every three years between March 1 and September 30 beginning in 1972.

COMPLETION OF JUROR QUALIFICATION FORM

The Clerk shall mail to every person whose name is so drawn a juror qualification form, with instructions to fill out and return the form, duly signed, and sworn to, by mail within 10 days as provided by § 1864.

In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form within ten days.

Any person who fails to return a completed juror qualification form as instructed, after further notice from the Clerk, may be summoned, on direction of the Chief Judge, by the Clerk to appear forthwith before the Clerk to fill out the qualification form.

EXCUSES ON INDIVIDUAL REQUEST

The district court hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the law, and shall be granted upon individual request:

1) Persons over 70 years of age.
2) Actively engaged members of the clergy.
3) Women who have legal custody of a child or children under the age of 10 years.
4) Actively practicing attorneys, physicians, dentists, and registered nurses.
5) Persons who have served as a grand or petit jury in a state or federal court within the past two years.
6) School teachers in public, parochial, or private schools actively teaching.
7) Sole proprietors of businesses.
8) Any person who resides more than 100 miles or two hours travel time from the place of holding court if called to serve on a petit jury.
9) Any person who resides more than 49 miles from the place of holding court if called to serve on a grand jury.
10) Persons who have the sole care of others who are under disability.
11) Persons who do not have transportation available to attend court sessions.

EXEMPTION FROM JURY SERVICE

The district court hereby finds that exemption of the following groups of persons of occupational classes is in the public interest and would not be inconsistent with the Act, and accordingly members of such groups are barred from jury service:

1) Members in active service in the Armed Forces of the United States.
2) Members of the fire or police departments of any State, district, territory, possession or subdivision thereof.
3) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory or possession or subdivision thereof, who are actively engaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

DETERMINATION OF QUALIFICATIONS, EXCUSES, AND EXEMPTIONS

(a) The Chief Judge on his initiative or upon recommendation of the clerk shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appeal in response to a summons, such facts shall be noted on said list.

(b) In making such determination the Chief Judge shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

QUALIFIED JURY WHEEL. The Clerk shall maintain separate qualified jury wheels for each division in the district, and shall place in such wheels the names of all persons drawn from the master jury wheel and not disqualified, exempt, or excused pursuant to this Plan. He shall insure that at all times at least 300 names are contained in each such wheel. Names drawn from the qualified jury wheel shall not be made public until the panel of jurors have been summoned and have appeared at the courthouse provided that the Chief Judge may order the names made public at an earlier date, or to be kept confidential in a case or cases when the interests of justice so require.

ASSIGNMENT TO PANELS

The panel of jurors summoned as petit jurors shall report in the jury assembly room. When a petit jury pool is used their names shall be placed in a jury wheel and shall be drawn therefrom at random in the number required by each of the respective judges holding court. Those so drawn shall report in that judge's courtroom. Those not selected to serve on a case, "left-over" jurors, shall return to the jury assembly room to be available for further assignment or to be excused on Order of the Chief Judge.

GRAND JURY PANEL

Names of persons for grand jury panels shall be publicly drawn at random from the Qualified Grand Juror Wheel of the District of Colorado as directed by the Chief Judge. Names placed in this wheel shall be obtained from the three Qualified Juror Wheels of the respective divisions on a pro rata basis.

JUROR QUALIFICATION FORM

The Jury Qualification Form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States shall be used.

Pending the approval of a proper form by the Judicial Conference of the United States, the attached unofficial questionnaire shall be used.

EFFECTIVE DATE: This Plan shall become effective after approval by the reviewing panel of the Judicial Council of the Tenth Circuit as such time thereafter as the panel shall direct.

DATED at Denver, Colorado, this 3rd day of September, 1968.

/s/ Alfred A. Arraj
ALFRED A. ARRAJ,
Chief Judge

/s/ Hatfield Chilson
HATFIELD CHILSON,
Judge

/s/ William E. Doyle
WILLIAM E. DOYLE,
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF
JURY SELECTION PLAN

ORDER MODIFYING PLAN

Filed April 25, 1972

The Jury Selection Plan of the Court was approved by the Reviewing Panel of the Judicial Council of the Tenth Circuit on September 18, 1968. It appears that Congress has enacted into law a reduction of the minimum age for Federal Jury service to age 18, and that our present plan should be modified to include a full representation of names of persons 18 years of age or older from the voters registered for the 1972 General Election, so that they may be adequately represented and included in the Qualified Jury Wheels, not later than October 1, 1973.

It is, therefore,

ORDERED, subject to the approval of the Review Panel of the Judicial Council of the Tenth Circuit, as follows:

1. That the Jury Selection Plan be modified by the repeal of that portion which reads as follows:

> "The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein provided between March 1 and September 30 in every odd numbered year beginning in 1971.
>
> The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every three years between March 1 and September 30 beginning in 1972."

2. That the Jury Selection Plan be modified and amended by the adoption and inclusion of the following:

> "The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein

provided between January 1 and September 1 in every odd numbered year beginning 1973.

The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every four years between January 1 and September 1, beginning in 1973."

3. That this modification of the Jury Selection Plan shall become effective upon the approval of the Review Panel of the Judicial Council of the Tenth Circuit.

DATED at Denver, Colorado, this 25th day of April, 1972.

BY THE COURT:

/s/ Alfred A. Arraj,
ALFRED A. ARRAJ
Chief Judge
United States District Court

PRESENT:

Alfred A. Arraj, Chief Judge
Hatfield Chilson, Judge
Fred M. Winner, Judge
Sherman G. Finesilver, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 72-CR-352

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN E. TEST, DEFENDANT

MOTION TO DISMISS INDICTMENT BECAUSE OF DENIAL OF A FAIR AND IMPARTIAL JURY

Filed January 2, 1973

COMES NOW the above-named defendant, by and through his attorney, Walter L. Gerash of Gerash, Gerash & Davis, and moves this Honorable Court to dismiss the above-numbered indictment because the Grand Jury and Petit Jury arrays systematically exclude portions of the community, thus denying the defendant a fair and impartial jury and a jury of his peers.

AS GROUNDS THEREFOR, defendant states:

1. He is presently 28 years of age.
2. On information and belief, the master lists for the grand and petit juries in question are formulated from the voter registration lists of the State of Colorado, and said lists exclude in disproportionate numbers persons with Spanish surnames, students and blacks, thus violating 28 U.S.C. § 1962 and the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.
3. On information and belief, the class of persons who actually served on the Grand Jury in question and will serve on the petit jury systematically excluded and will exclude those persons under the age of thirty-five, with Spanish surnames, of the Negro race, and students, all in violation of 28 U.S.C. § 1862 and the defendant's

rights under the Fifth and Sixth Amendments to the United States Constitution.

4. That 28 U.S.C. § 1865 (b) (1) citing the qualification that prospective jurors must reside within the judicial district within a period of one year violates the due process clause of the Fifth Amendment of the Constitution of the United States of America.

WHEREFORE, defendant prays this Honorable Court to dismiss the above-numbered indictment for the above-stated reasons, or, in the alternative, to afford the defendant an evidentiary hearing at which time the defendant will present proof of non-compliance with 28 U.S.C. § 1861 et seq.

GERASH, GERASH & DAVIS
Suite 2317, 1700 Broadway
Denver, Colorado 80202
222-8574

By /s/ Walter L. Gerash
Attorneys for Defendant
John E. Test

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 72-CR-352

[Caption Omitted in Printing]

DEFENDANT'S MOTION TO INSPECT, COPY AND REPRODUCE THE MASTER JURY WHEEL AND QUALIFIED JURY WHEEL

Filed January 2, 1973

COMES NOW the above-named defendant, by and through his attorney, Walter L. Gerash of Gerash, Gerash & Davis, and moves this Honorable Court to enter an order allowing him to inspect, copy and/or reproduce the Master Jury Wheel and the Qualified Jury Wheel of the District Court pertaining to the Grand and Petit Juries in the instant indictment.

AS GROUNDS THEREFOR, defendant states:

1. It is necessary to inspect such lists in order to present evidence at a hearing in conjunction with movant's Motion to Dismiss Indictment Because of Denial of a Fair and Impartial Jury, filed herein.

2. The opportunity to inspect and copy such lists is provided in the Jury Selection Act, 28 U.S.C. § 1867(d), and is necessary to the vindication of defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

3. A sworn statement concerning non-compliance with 28 U.S.C. § 1961 et seq. is attached to this motion as "Exhibit A."

WHEREFORE, defendant prays this Honorable Court to enter an order permitting him to inspect, reproduce and copy the records or papers used by the Clerk of the District Court in connection with the selection process of the Master Jury Wheels and the Qualified Jury

Wheels of the Grand and Petit Juries in the instant case.

GERASH, GERASH & DAVIS
Suite 2317, 1700 Broadway
Denver, Colorado 80202
222-8574

By /s/ Walter L. Gerash
Attorneys for Defendant
John E. Test

DEFENDANT'S EXHIBIT "A"

Filed January 2, 1973

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

WALTER L. GERASH, being first duly sworn upon oath, deposes and says:

On November 8, 1972, in the District Court in and for the County of Boulder, State of Colorado, in the case entitled *People of the State of Colorado* v. *Florencio J. Granado*, Criminal Action No. 5738, an all-day hearing was conducted. This hearing was based on a motion to quash the petit jury panel on the grounds that the voter registration lists plan of selecting jurors systematically excludes persons with Spanish surnames, youths under 30, students and workers. Prior to the hearing the District Attorney confessed the inspection of the qualified jury list.

At the hearing witness Marcela Trujillo, an expert in romance languages, identified a certain amount of Spanish surnames from the 8,000 qualified jury list. She testified that from the 8,000 there were 150 with Spanish surnames.

The 1970 U. S. Bureau of the Census figures disclosed that Chicanos 18 and over represent 5.42 percent of the total population of people in the age group in Boulder County. Those 21 and older made up 5.34 percent of the total population.

Then witness George Bardwell, a mathematician from the University of Denver, testified that the percentage of Chicanos on the jury list of 8,000 was 1.92 percent. Professor Bardwell said that the probability of 1.92 percent occurring by chance was as unlikely as getting six straight royal flush hands in poker. The mathematician further testified that people 18 to 30 years of age represented 41.30 percent of the general population of Boulder County while those people 20 to 30 years of age con-

stituted 31.7 percent, according to the United States Census. However, the number of people in the 20 to 30 age group represented only 17.5 percent of the jury list. If jury members were truly selected at random, Professor Bardwell testified, that one can reasonably expect figures of 36.9 and 45.3 percent between 18 and 30.

These scientific findings have statistically exposed the voter registration lists as being unrepresentative of the defendant's peers. This is the voter registration list system used by the present plan of the United States District Court for the District of Colorado. There is probable cause to believe that there is the same systematic exclusion in the United States District Court and a hearing should forthwith be held after the qualified list is given to defendant's attorney for inspection so that a full fair hearing can be held.

The presiding judge also felt that there is systematic exclusion but denied the relief because the Supreme Court of Colorado stated that the voter registration list system should continue a hear and refused to give full force and effect the existing legislation that called for supplementing the voter registration lists with other lists by March of 1972.

/s/ Walter L. Gerash
WALTER L. GERASH

[Jurat and Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

72-CR-352

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN E. TEST, DEFENDANT

EXCERPT OF TRANSCRIPT OF HEARING ON MOTIONS

Filed June 7, 1973

Proceedings before the HONORABLE ALFRED A. ARRAJ, Chief Judge, United States District Court for the District of Colorado, beginning at 8:30 a.m., on the 23rd day of January, 1973, in Courtroom A, United States Courthouse, Denver, Colodaro.

APPEARANCES:

J. TERRY WIGGINS, Assistant United States Attorney for the District of Colorado appearing for the Plaintiff.

WALTER GERASH, Attorney at Law, Denver, Colorado, appearing for the Defendant.

[2] PROCEEDINGS

THE COURT: 72-CR-352, United States versus John Test. Mr. Wiggins for the government and Mr. Gerash for the defendant. The matter is before the Court on several motions filed by the defendant. I shall go through the motions myself and see what we need if anything in the way of argument.

* * * *

[8] Now, the only other two motions deal with the jury selection process, and we have been through this several times, Mr. Gerash.

MR. GERASH: Except I have a new wrinkle, Your Honor.

THE COURT: All right. On the old wrinkles, there is the same ruling.

MR. GERASH: Well, the Court is going to be very surprised.

THE COURT: All right.

MR. GERASH: I had an opportunity to raise this issue at the Tenth Circuit Court of Appeals, but unfortunately, the Tenth Circuit reversed it on a different ground, so I have never gotten to the Tenth Circuit on this issue. However, the Court will please note that my affidavit that I attached to my motion to inspect pursuant to 28 USC 1867(d), which in my opinion makes it mandatory for the Court to allow us to inspect and says "shall," but there is required an affidavit.

Now, basically, without my rereading my affidavit, I tried a case before Judge Scott, entitled People versus Florencio Granada. Granada was charged with assaulting a [9] police officer with his own pistol, and I had a one-day hearing before Judge Scott. Boulder uses the voter registration lists or they did at that time, and they have not been supplemented by the Supreme Court as they should have been in January of 1972.

The Supreme Court pursuant to the statute at that time—it says that the Supreme Court or the court shall supplement these lists by various other methods like—

THE COURT: You are talking about the state law.

MR. GERASH: Right.

THE COURT: All right.

MR. GERASH: But the reason that it is appropriate here is that Bolder County uses the voter registration lists, which the federal plan uses here. So, what happened, here's what we did.

First, we went to the population census, in 1970 and we found out that in Boulder County as to Chicanos, Spanish surnamed people, there were about 5.42 percent total population, and those 21 and older were 5.34 percent of the total population, U. S. Census.

Then we went to the 8,000 qualified list, of the qualified list, that is after throwing off people who had felonies and people who are elderly and so forth. We find only 1.92 percent of Spanish surnamed, and the mathematician, George Bardwell, from the University of Denver and University [10] of Colorado, where he taught also, stated that the probabilities of this disparity occurring by chance was as unlikely as getting six straight royal flush hands in poker. In other words, the probability of that happening is ten to the 38th power, so, therefore, there is a high probability that this federal plan that uses the voter registration lists apropos to Spanish surnames, that these persons will be woefully inadequately represented.

Now, in Peters versus Kiff, this Supreme Court—now, we are not talking about the Warren Court or the Holmes Court, but this court, this Supreme Court—in Peters versus Kiff stated that my client does not have to be one of the minority group excluded. He can be Anglo, White, but he is entitled to a cross-section of the community, so we have standing.

Now, also Professor Bardwell in analyzing the statistics as to age, also found that people 18 to 30 represented 41.3 percent of the general population of Boulder, and that 20 to 30 constituted 31.8. However, when he looked at the qualified list based on the voter registration system, only 17.5 of the youth were represented, so they were under-represented at least 40 percent, and this being a drug offense and utilization of drugs being an epidemic in the high schools and in the communities, we feel the jurors from 18 to 30 would have a more sympathetic attitude toward the defendant in this case, so it is a very real thing, very real thing.

[11] Professor Bardwell stated that the voter registration list absolutely excludes so much that in that case it was three straight royal flushes in a row that young people from 20 to 30 would be under-represented.

So I have before the Court my affidavit that shows probable cause for this Court to be suspicious enough for me to analyze the jury, the qualified list, so I can show this Court by scientific evidence that Chicanos, Spanish surnamed people and young people are systematically excluded by the voter registration system.

Now, this Court and Judge Winner, and I believe it was Judge Chilson—

THE COURT: Doyle.

MR. GERASH: Yes, Doyle, and Judge Chilson. In fact, Judge Chilson in the Cordova case, which we eventually won in the Tenth Circuit on a different ground, but in that case I made the argument to him and he said and you said to me, "Well, how can we supplement? How can we change it?" Well, I am ready to tell the Court that.

THE COURT: All right, tell me.

MR. GERASH: All right, I am ready to tell the Court that this federal government has the income tax returns of almost all persons who work in this country, and I think they can easily give us the income tax return and we can choose from the income tax returns. They are all IBM. We can get [12] the names. We can go to the University of Boulder. They can go to the U. S. Census. It is all patterned, and if we can't get them, we can supplement them with the University of Colorado, University of Denver, Metro State College. We can get the young people. We can go to the people who drive cars now even, young people. We can go to the registration at the motor vehicle bureau. They have them all on IBM systems. We can use the city directories. In fact, my old affidavit said that Mr. Erickson stated that any system that uses the voter registration list systematically excluded at least half of the young people and minority people and he gave the reasons, but this is an actual court hearing.

Judge Scott thinks I am right, and the reason he didn't grant me my relief, and unfortunately I won the case or else it would be in the Supreme Court, and it seems like I can never get a high body to review it, but I will, but anyhow, Judge Scott said that, "You made your case, but since the Supreme Court postponed the utilization of the supplementing of the list until '73, what am I going to do? They said they would do that and it seems to me they would not overrule themselves."

So I never had it resolved, but what I am trying to say is my affidavit before the Court, and I am on all four

squares, I have presented to this Court my affidavit. My affidavit has tested the voter registration system and has [13] found it horribly wanting by scientific evidence, Your Honor. All I ask is the same thing to—all I want is the qualified list.

THE COURT: How can you tell that a person is black?

MR. GERASH: I am not talking about blacks.

THE COURT: Just Chicanos?

MR. GERASH: Absolutely, because the government does it by the Spanish surname system of analysis and I can tell with language experts like I did in Boulder which ones are Spanish surnamed and which ones are not and I can tell it absolutely and I can tell the age because the ages are given by the jurors in their applications and I can tell when young people have been systematically excluded.

THE COURT: We know that so far in our jury selection there have been no jurors between the ages of 18 and 21. I am putting that on the record. There will be starting this year, because we got the new registration lists from '72. That's the last one, and the young people that registered will be a part of the overall reservoir.

MR. GERASH: That will be fine.

THE COURT: Of names, so they are going to be in.

MR. GERASH: That will be better.

THE COURT: It is not going to help you. I concede to you, Mr. Gerash, that there are not—the percentage of Chicanos selected for jury service under the system that we [14 utilize is less than the proportion of population of the Chicano people in any given county—I wouldn't say in any given county, but in most, so we concede that. We are starting with that, so what you are looking at, the master jury wheel will prove. It will prove what we concede, so the record shows that.

MR. GERASH: But, Your Honor, what I want to show is that it is not a miniscule amount. It is a very substantial amount, and since this Court has the power or had the power since 1968 to supplement the list, to supplement the list—

THE COURT: We cannot get your income tax, a copy of your income tax return, Mr. Gerash. There is no way that I know of that our court can get that unless it is involved in a litigation, but we can't write to the Treasury and say, "Furnish a copy of all the income tax lists," and also that's a ridiculous suggestion in my opinion because then you come back and say that the blacks and Chicanos are the low-income people. They don't earn enough to file a tax return, therefore you are not getting them.

MR. GERASH: The poor people pay most of the taxes in this country.

THE COURT: Well, not income taxes. They may pay sales taxes, but they don't pay most of the income taxes.

MR. GERASH: Another thing I would like to point out, the further invidiousness of the voter registration system [15] is this, if you don't vote in the election, either gubernatorial, congressional or presidential election, you are purged from the list and we found that over —almost as high as 25 to 30 percent of the people have been purged from the lists.

THE COURT: Now, wait, you are not—we do not have the list after the election. We get the list prior to election time, so we get the registered voter. Whether he votes or not, he is in this, if he was registered.

MR. GERASH: But, but I mean the new list, though, he is automatically purged from the voter registration list.

THE COURT: But he can reregister.

MR. GERASH: Right, but if he doesn't, in other words, if he is disenchanted with the electoral process, it says therefore he can't be a juror. I don't think that necessarily follows. He is a member of the community and pays his taxes, and I have some statistics on that, but what I am trying to say is certainly that in the 1970 election in fact, which was an election where a lot of people didn't vote, those persons have been purged.

Now, I do not know if you are still operating from the '68 list or the '70 election, but if you are operating under the '70 election, those who did not vote in the '70 election were purged, and if they didn't reregister they would not be on the '70 list, and if you are still operating under the '68 list, certainly, there is going to be a lot of young [16] people who were, you know, like 20, who are four years—who have to be 25 years of age, so automatically you are going to lose people from 21 through 25.

What I am trying to say, Your Honor, is that I have established probable cause through my affidavit that I would like to look at and make a record to at least have a hearing. I want to put my foot in the door to have a hearing. The Courts have united for whatever reason, but I think if I can amass a statistical analysis and convince this Court, and I think my client is entitled to a fair hearing, because we are under the grand jury system, and if I can show that the composition of the grand jury is woefully inadequate to deny my client a consideration of his peers, then the indictment is no good, and in fact I am not unique, Your Honor.

I have in my hand United States versus Gray, Molino, Thomas, Queros and Queros, Criminal Action No. 72-279, in the District Court for the Western District of Oklahoma, and several professors representing the Indians, native Americans, who were arrested for possessing stolen goods from Washington, D.C., when there was a sit-in at the Bureau of Indian Affairs, and they have raised these same issues, perhaps a little more uniquely specific to their jurisdiction. I painted a broader picture. I haven't gotten down to some of the unique problems, but just one problem that is raised is this, the Supreme Court of the United States [17] says that you can't exclude a person from voting because he has a small residency. The act says you have to live in the jurisdiction for one year. In other words, this jury selection act, that part of it that states that he must live in the jurisdiction for one year, is unconstitutional because the Supreme Court said that you can vote if you reside thirty days in—

THE COURT: Well, if our jury act is unconstitutional, you have no problems. Your motions are denied. You can get it reversed on the grounds—

MR. GERASH: Well, that's later, but I want to look at the qualified jury list in order to have a hearing. In other words, I want a hearing.

THE COURT: You are not going to have a hearing in this case. If you want to look at the jury list some time, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that.

MR. GERASH: All right.

THE COURT: That's on the record.

MR. GERASH: My position is, though, if I can show it is so overwhelming, it is a violation of due process, and I [18] can't do it. I have nothing to go up to the Tenth Circuit on if I lose this case to show that it is substantial.

THE COURT: Well, it is denied and we would welcome you to put in writing your suggestions as to how the jury plan that's in existence, and you have a copy of it, you have been furnished a copy—if you will put them in writing, we will explore them. We are searching, frankly, for ways to supplement our list, and for your information I have compiled and I have in my hand here the population from the 1970 census in each county in each jurisdiction in the State of Colorado, and I also have the number of Spanish surnamed people in each county, and I also have the number of blacks in each county in excess of 500. The census doesn't have it below that, and I paid for the book myself to get this information.

MR. GERASH: Your Honor, for your edification I think and help, and also for the record, the American Criminal Law Review, Volume 10, No. 4, Summer of 1972, put out by the ABA, American Bar Association—that's in a symposium on the grand jury—this is summer, '72—the American Criminal Law Review has a fantastic article on jury selection, mathematical method, on Page 771, "Jury Selection, Mathematical Method," by David Kairys, and in his analysis he gives a little background, and what is very fascinating is that he states

this at Page 797. He says, "The source, Voter Registration List. No source may be used which is discriminatory against a [19] cognizable group. Most courts considering the issue have held that voter registration lists are a proper source for judicial selection," citing the cases. "However, voter lists may not be used when they are actually a subterfuge for discrimination. Moreover, some courts have suggested that voter lists are per se an unconstitutional source since they are not representative of a cross-section of the community and they exclude many persons who are statutorily qualified for jury service," and they cite the cases of Pullam versus Green, 396 F 2d 251, at 255, a Fifth Circuit case of 1968.

THE COURT: Well, I am familiar with those cases. I have your citations.

MR. GERASH: But, however, they also cite a United States Department of Commerce, Bureau of Census, Population Characteristics, Voting and Registration in the Election of November, 1968, Series P-20, Number 192, 1969, and there they cited a detailed federal report which compares the characteristics of registered voters with the characteristics of the whole population, factually supporting the conclusion that voter lists are discriminatory. This is the United States Government figures, U. S. Department of Commerce, and also it says the report also disclosed that those of lower incomes, educational and job level, as well as those under 35 years of age, were under-represented and this is precisely what my figures showed before Judge Scott in the Boulder case of People [20] versus Granada, and it is not just a theoretical quibbling that youth and Spanish surnames are under represented. It is substantial and it goes to the vitiating of a fair trial.

THE COURT: All right, Court is in recess.

(Whereupon, at 9:10 o'clock a.m., the proceedings were concluded.)

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[Reporter's Certificate Omitted in Printing]

MINUTE ORDER OF THE DISTRICT COURT,

JANUARY 24, 1973

Filed January 24, 1973

[Caption Omitted in Printing]

* * * *

Motion to Inspect, Copy, and Reproduce the Master Jury Wheel and Qualified Jury Wheel

Ordered: Arrangements could be made for defendant through attorney Walter L. Gerash to do so, but denied as to an issue in this case.

Chief Judge Alfred A. Arraj
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1973

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. 72-CR-352)

Filed November 1, 1973

James L. Treece, United States Attorney, and J. Terry Wiggins, Assistant United States Attorney, Denver, Colorado, for Appellee

Louis M. Fischer, Denver, Colorado and Walter L. Gerash, Denver, Colorado, for Appellant

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Before CLARK,* Associate Justice; SETH and McWILLIAMS, Circuit Judges.

PER CURIAM:

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* Associate Justice, United States Supreme Court, Retired, sitting by designation.

Appellant John E. Test stands convicted by a jury on a one count indictment charging him with knowingly and intentionally distributing a controlled substance, to wit: Lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 841.[1] On his appeal Test presents several questions but only two have substance, i.e., (1) Was Test entrapped as a matter of law and (2) Did he have the specific intent required by the statute. We have concluded that neither point has merit and, therefore, affirm the conviction.

1. *Facts and Circumstances*:

John Test first met Peter Brophy, the Government informer, in October, 1971, as a customer at Brophy's fish market, Seafood Limited, located in the Happy Canyon Shopping Center in Denver, Colorado. During the next several months Test and Brophy developed a friendship. Test performed odd jobs at Seafood Limited and he and Brophy drank beer together occasionally; Test was invited to Brophy's home and met his wife. It appears that at various unspecified times Brophy told Test that he had prior dealings in smuggling marijuana from Mexico to California, that he was a pilot and had used a plane to bring the contraband into the United States, and that he had invested his illegal profits in Seafood, Limited. None of Brophy's accounts of his trafficking in illicit drugs was true.

By February 24, 1972, the relationship having continued, Brophy told Test that he would like to have a few tablets to give some friends; and Test obligingly produced seven tablets in a tinfoil packet which he said were "probably mescaline and acid." Brophy turned the tablets over to Agents Ercole and Lochridge of the Bureau of Narcotics and Dangerous Drugs; and a laboratory test revealed that they were LSD cut by a large amount of stearic acid. Test denied giving the tablets to Brophy. On March 13, 1972 Brophy called Agent Allen of the Bureau and arranged for Allen to come to Seafood Limited to meet Test. Neither Brophy nor Test had met Allen previously. Allen posed as Tom Stone, a ski instructor at Aspen and former associate of Brophy in the drug traffic in California. Allen testified that he told Test that he wanted to buy some cocaine and that Test told him "he had a connection for cocaine who could sell pound quantities . . ." quoting a price of $11,000 per pound. They discussed the purchase of approximately two to five pounds. In addition Test said he "could supply . . . marijuana, hashish, LSD and amphetamines." No sale or distribution was made at this meeting.

A second meeting between Agent Allen and Test occurred on March 15, 1972. While Brophy's part in the meeting is somewhat hazy, it appears that he overheard "a lot of the talk" but was not an active participant. Test told Allen that "there would be a delay in the delivery of the cocaine" but that "he had been successful in reducing the price of cocaine from $11,000 to $10,500" and that he "had access to 40 pounds of marijuana which he would be willing to sell for $145 a pound." As to cocaine, the two discussed a purchase price of $42,000 for four pounds. Apparently both parties then endeavored to make a showing of good faith. Agent Allen displayed $15,000 in Government funds (Test claimed it was $50,000) in the trunk of his car. Test gave Allen a marijuana cigarette saying that he hoped he enjoyed smoking it. When it became apparent, however, that Test could not produce any cocaine, Allen said: "I have to show my people something" and asked Test "if he could get any other substances." Test replied "that he might be able to get him some mescaline."

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[1] 21 U.S.C. § 841 provides in pertinent part:

"(a) Unlawful acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance".

21 U.S.C. § 812 specifies that Lysergic acid diethylamide is a Schedule I controlled substance.

Subsequently, on March 27, 1972, Brophy contacted Agent Allen to set up a meeting for the purchase of 2,000 tablets of what was alleged to be mescaline. Allen met Test the next day at Seafood Limited. The sale was made inside a Government car parked in the shopping center parking lot. Allen paid Test $450 and received approximately 1000 tablets in a plastic bag. Test told Allen that the tablets "were stamped out by his friends" and that "he could get 50,000 tablets more." He testified that he had purchased the tablets two days earlier from two friends in Pine, Colorado paying $400 for them and leaving him a $50 profit on the deal.

Agent Allen testified that when he purchased the tablets, he believed them to be LSD. "Most of the drugs," he said, "that we have encountered that have been referred to us, chocolate mescaline as they were called, in fact turned out to be LSD." Subsequent laboratory analysis of the actual 1,018 brown tablets received by Agent Allen disclosed that they contained LSD cut by phencyclidine (PCP). The Government's expert witness, Mr. Ruybal, a forensic chemist with the Bureau of Narcotics and Dangerous Drugs, testified at the trial that he had analyzed more than five hundred separate samples of drugs denoted as mescaline but that they normally did not contain mescaline but were usually LSD by itself, PCP by itself, or LSD cut by PCP. He stated that PCP was a normal cutting agent for LSD.

2. *Entrapment*:

Test asserts that he was unquestionably entrapped as a matter of law and should, therefore, have been acquitted. His claim is based on Brophy's alleged exploitation of their friendship to set him up for the drug deal with Agent Allen, Brophy's false stories of his prior drug exploits, his introduction of Agent Allen under false pretenses, Agent Allen's repeated requests for the production of drugs, and his showing of a large sum of money despite the fact that Brophy and Allen knew Test had no prior criminal record but kept after him on the theory that he might have known some large drug traffickers.

Entrapment is a "relatively limited defense." *United States* v. *Russell*, 411 U.S. 423 (1973). Entrapment as a matter of law is the more limited in terms of its availability. It is rudimentary that entrapment as a matter of law can only be found where it appears unmistakably clear to the trial judge that undisputed evidence establishes that the criminal design originated with Government agents, was the product of their creative activity and was implanted in the mind of an otherwise innocent person totally lacking the requisite predisposition to commit the crime. *Sorrells* v. *United States*, 287 U.S. 435 (1932), *Sherman* v. *United States*, 356 U.S. 369 (1958).

In *Sorrells*, *supra*, the Supreme Court stated that when a defendant claims entrapment:

> "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451, 452.

In line with this concept, this court has exhaustively scrutinized the record examining the conduct of informer Brophy, of Special Agent Allen as well as the conduct and predisposition of Test. Construing the evidence in the light most favorable to the Government, as we are required to do, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we are not persuaded that the conduct of the Government's agent and informer was so improper, overzealous or otherwise offensive as to amount to entrapment as a matter of law. As the Supreme Court said in *United States* v. *Russell*, *supra*: "*Sorrells* and *Sherman* both recognize 'that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution,' 287 U.S., at 441; 356 U.S., at

372. Nor will the mere fact of deceit defeat a prosecution, see, *e.g.*, *Lewis* v. *United States*, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available." At 435-436.

Here, Test contends he was tricked and enticed by his friend Brophy—their friendship exploited. There is no evidence in the record which conclusively establishes that Brophy was a paid Government informer when he first met Test. Nevertheless it is true that Test's friendship with Brophy had a bearing of Test's delivery of the seven tablets on February 24, 1972. However, Test was not indicted or convicted for this distribution. Brophy did utilize his friendship with Test to introduce him to Agent Allen but thereafter played a decidedly unobtrusive role in the course of events leading up to Test's transaction with Agent Allen on March 28th. Neither this mere introduction nor his actions as a go-between for Allen and Test in arranging their meeting rises to the level of entrapment as a matter of law. Nor can Test successfully argue that his friendship with Brophy had such a compelling spillover effect on him *vis-a-vis* his relationship with Agent Allen that he was rendered powerless to distinguish between right and wrong or to refuse to cooperate with Agent Allen. Allen's requests for the production of drugs are a judicially acceptable tactic especially since the solicitations involved here were met with very little, if any, firm reluctance on Test's part. Furthermore, there is no evidence that Allen threatened, cajoled or browbeat Test. Indeed, Test volunteered extensive information about his drug connections, what types and quantities of drugs were available and presented Allen with various options and alternatives. Nor was Agent Allen's display of cash a fatal flaw in the case when viewed in the context of the negotiations at that point. It was merely a showing of good faith. Test's *quid pro quo* was the gift of a marijuana cigarette. Finally, all the evidence concerning Test's continuous pattern of illicit drug activities and his state of mind as revealed by his highly significant admissions at the trial is convincing proof that he was

no cats-paw for Brophy but was in reality a drug trafficker. He fails to qualify as the "unwary innocent" victimized by a pernicious criminal scheme wholly manufactured by law enforcement officers. *Sherman* v. *United States*, *supra*, at 372. His lack of a prior criminal record, contrary to his claim, is not exculpatory.

Although the trial judge found, and we agree, that there was no entrapment as a matter of law in this case, the Government, citing *Martinez* v. *United States*, 373 F. 2d 810 (10th Cir. 1967), contends that Test was not entitled to have the entrapment issue submitted to the jury because he plead not guilty to the offense charged. Whether or not this be so as a general rule,[2] a matter we do not reach, it is clear that the Government's case here was in no wise prejudiced by the submission because the jury found with the Government.

3. *Specific Intent*:

Test's second line of defense is that he lacked the specific intent required by the statute to commit the offense for which he was convicted. He claims a judgment of acquittal should have been entered on the grounds that he did not knowingly and intentionally distribute LSD, "although he may have had the intent to distribute mescaline." At the trial Test testified that he told Agent Allen that he "might be able to get him some mescaline," that subsequently he "purchased the mescaline" for $400, that he sampled the tablets to be sure they were not LSD, and that he dispensed over one thousand tablets to Agent Allen on March 28, 1972, two days after he purchased them, for $450. He stated he knew LSD was illegal but "wasn't sure" about mescaline.

Unquestionably it is the province of the jury to pass upon guilt or innocence. *Sinclair* v. *United States*, 279 U.S. 749, 765 (1929). Where, as here, an essential element of the offense charged is the specific intent to commit it, the issue of intent is to be submitted to the jury. *Screws* v. *United States*, 325 U.S. 91, 106-107 (1945).

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[2] See, *Sorrells* v. *United States*, 287 U.S. at 439, 451-452.

Whether or not Test new the character of the substance he was distributing or that his distribution was an illegal act is not for this court to say. It is the jury's function and duty to weigh the conflicting evidence and draw reasonable inferences therefrom in making its judgment. And any claimed ignorance of the law on Test's part is no excuse. *United States* v. *International Minerals & Chemical Corporation*, 402 U.S. 558 (1971).

We believe that was substantial credible evidence before the jury, both direct and demonstrative, from which it could justly reach its verdict, and we are bound to sustain it. *Glasser* v. *United States*, *supra*, at 80. To hold otherwise would precipitate a headon collision with the Seventh Amendment. U.S. CONST. amend. VII, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd., et al.*, 369 U.S. 355 (1962).

We have closely examined appellant's other contentions and find no merit in them. Accordingly, the judgment of conviction is affirmed.

Affirmed

SEPTEMBER TERM—NOVEMBER 1, 1973

Before Honorable Thomas C. Clark, Associate Justice*, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

This case come on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that John E. Test, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

Howard K. Phillips,
Clerk

/s/ Leon M. Islbeck
Deputy Clerk

Before Honorable Thomas C. Clark, Associate Justice*, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

(* Of the Supreme Court of the United States, Retired.)

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

(November 26, 1973)

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips,
HOWARD K. PHILLIPS,
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-5993

JOHN E. TEST, PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 1 presented by the petition which reads as follows:

> "1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. § 1867(d) in support of a motion to quash the jury and upon the presentation of a prima facie claim of constitutional dimension, i.e., the systematic exclusion of Mexican-Americans from the jury array?"

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